SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 1021

ROBERT G. MOOREMAN, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc.,

Petitioner,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 366 F. 2d 686. The opinion of the District Court is unreported. Both are reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered September 19, 1966. Rehearing was denied November 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1).

QUESTIONS PRESENTED

I.

May a Circuit Court of Appeals found its decision upon "facts" nowhere found in the record, and further, substitute its judgment for that of a Trial Court where there is substantial (and no conflicting) evidence to support the determination of the Trial Court?

II.

Can a corporation "authorize" its president to embezzle corporate funds and appropriate them to his own use, where such is beyond the scope of powers granted by its charter, and is by statute declared a crime?

III.

Can failure of a corporate officer to discover an embezzlement by the corporation's president constitute

either: a bestowal of actual "authority," or a holding out of apparent authority to embezzle, or appropriate corporate funds to his personal use in the future?

IV.

May one contracting with a corporate president in his personal capacity, assist him to appropriate corporate funds to his own use, and accept such funds in satisfaction of a personal debt?

STATUTES INVOLVED

Arizona Revised Statutes, Section 10-193; and Arizona Revised Statutes, Sections 13-681 and 13-682, are set forth in the Appendix.

STATEMENT OF THE CASE

Respondent in 1957 issued to Laing-Garrett Construction Specialties, Inc. a policy insuring the life of its president, Charles W. Laing. The corporation at all times remained the "rights owner" and beneficiary of the policy. In August of 1960 Respondent granted to the corporation a loan of $2,491.46 against the policy. Coincidentally Respondent had also issued a similar policy to Charles W. Laing personally, naming his wife as beneficiary and on which he was $458.55 in arrears in payment of premiums at the time of the corporate loan. At the request of Mr. Laing, Respondent paid only $2,032.91 of the loan proceeds to the corporation, and took the remaining $458.55 to pay Laing's personal premiums then in arrears. Respond-

ent did not inquire of anyone else whether such transfer was authorized. Laing did not enter the transaction on the corporate books and neither the shortage, nor the use of $458.55 by him personally, was in any way reflected on the books. Laing died in April 1961. Petitioner as Trustee of the then bankrupt corporation made claim against the policy. Respondent denied the claim, stating that the policy had lapsed for non-payment of the January, 1961, quarterly premium. Action upon the policy was filed in the District Court pursuant to Title 28, U.S.C. 1332.

The Trial Court found Laing was not actually or apparently authorized to direct use of corporate funds for payment of premiums on his personally owned policy, that Respondent was not authorized to use the corporate funds for payment of Laing's personal premiums; and that if Laing had ever paid his own premiums with corporate funds in the past, that the corporation and its other officer (Mr. Hilkert) had no knowledge of it. The District Court concluded that the policy was in effect at the date of death as Respondent could not lapse the policy when it was indebted to the policy owner in a sum sufficient to pay the premiums.

The Court of Appeals reversed, finding that by putting Laing in management of the company he was bestowed with *authority* to do as he saw fit, including even using corporate funds for personal uses; that he had paid his premiums in the past with corporate funds, and that Mr. Hilkert as the only other officer in failing to discover this and stop it had bestowed

authority upon Laing to appropriate the corporate loan proceeds; that such bestowal of authority was also binding on the Trustee in Bankruptcy and the corporation.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO REQUIRE AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

The Circuit Court has *created* "facts" essential to support its decision. This is not a mere substitution of an Appellate Court's judgment for that of a lower Court where contradictory evidence exists. Rather the crucial "facts" which in the opinion justify the holding are non-existent, are nowhere found in the record, and are contrary to the entire record. Such conduct by a Federal Circuit Court of Appeals is inexcusable and incomprehensible.

The Court "found the facts" to be that Laing had been using company money in the past, to such an extent that "at the time of his death he had overdrawn his salary in the amount of approximately $22,000;" that contrary to express findings by the lower Court, Hilkert, the other officer, did know of this, that such could be ascertained from the company books, that Hilkert as secretary did not perform his duties, and by allowing Laing management of the company without control of regular meetings and Minutes, *authorized* Laing to do as he saw fit. Nothing exists in the record to support any of these find-

ings. For example, the record actually shows Laing's salary account reflected the corporation was indebted to him in the sum of $1,798.30 at the time of his death, rather than a $22,000.00 debit (pages 320-321; Exhibits "Z" and "11"*); the corporation did meet and keep Minutes (pages 262-263); the books did not reveal Laing's use of corporate money in the past, including airplane tickets (page 265), or to pay insurance premiums on a personal policy (page 323); and the corporation had neither actual nor implied notice thereof (Trial Court's Finding No. 12). Neither does the record support a conclusion that Hilkert was not performing his duties as secretary, or by virtue of being secretary he was chargeable as a matter of law with knowledge of embezzlements carefully concealed on the books.

Clearly the opinion not only misstates the uncontroverted facts, but "from out of the blue" finds additional facts necessary to its conclusions. Its decision is, therefore, founded upon false premises and cannot be sustained.

Peculiarly the opinion offers absolutely no justification for its statements, nor for upsetting findings of the Trial Court. In fact, it ignores such as if they didn't even exist. There is no possible way the Court of Appeals could find apparent authority and therefore, reliance by Respondent, when only two days preceding the diversion they had refused Laing's request for the loan, and required written confirmation of

*Page references are to Reporter's Transcript of Trial Proceedings. Exhibit references are to Exhibits a part of the record on appeal.

authority from the corporation. (While not in itself grounds for certiorari, if this Petition is granted, Petitioner will request the Court consider the Appeals Court's violation of the "clearly erroneous rule.")

While Courts understandably differ in their application of law, such a "reworking" of facts as done here and issuance of opinions which bear so little resemblance to the cases involved make opinions of the Ninth Circuit a farce. Such conduct requires the intervention by the Supreme Court in its supervisory capacity. Litigants and all attorneys practicing before the Federal Bar are entitled to know that opinions of a Circuit Court are accurate reflections of cases reported; that Circuit Courts, like any other Court, are not immune to reprimand if they overstep their limits; that the Supreme Court of the United States in its supervisory capacity is ever willing to intervene in proceedings where a Circuit Court does depart from the usual course of judicial proceedings to the extent that the litigants are not granted a fair and judicial determination.

Fitzgerald v. United States Lines, 83 S. Ct. 1646, 374 U.S. 16, 10 L. Ed. 700 (1963);

Price v. Johnston, 68 S. Ct. 1049, 334 U.S. 266, 9 L. Ed. 1356 (9th Cir., 1948);

Graver Tank & Mfg. Company v. Linde Air Products Company, 69 S. Ct. 535, 336 U.S. 271, 93 L. Ed. 672;

McAllister v. United States, 75 S. Ct. 6, 348 U.S. 19, 99 L. Ed. 20 (1954);

Gutierrez v. Waterman Steamship Corp., 83 S. Ct. 1185, 373 U.S. 206, 10 L. Ed. 297 (1963).

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND ALSO APPLICABLE STATE LAW.

Appropriation of the corporation's assets to personal use of its officers was beyond the powers authorized by the corporate charter (Exhibit "1"). Such appropriation when also falsely entered on the books of the company was a crime (A.R.S. 10-193; A.R.S. 13-681 and 682). Hence the diversion of the corporate loan proceeds to payment of Laing's personal premium was ultra vires and against public policy. This Court in a long series of cases, including:

Central Transp. Co. v. Pullman's Palace Car Company, 139 U.S. 24, 11 S. Ct. 478, 35 L. Ed. 55;

Western Nat. Bank of New York v. Armstrong, 152 U.S. 346, 38 L. Ed. 420, 14 S. Ct. 572;

Aldrich v. Chemical National Bank, 176 U.S. 618, 44 L. Ed. 611, 20 S. Ct. 498;

has left no doubt that any attempt to use corporate assets for purposes beyond those specified in the corporate charter, and as here, also against public policy, are void and incapable of authorization. Arizona has expressly adopted the rule of the *Pullman* case above (*Trico Electric Cooperative v. Ralston,* 67 Ariz. 358, 196 P.2d 470 (1948)); and it was not the prerogative of the Court of Appeals to decline to follow this rule. See also: 3 Fletcher, Cyclopedia Corporations, § 1109, pages 736-737:

> "Directors or other corporate officers have no authority to use corporate funds to pay their pri-

> vate debts, even though the corporation is indebted to them, and 'the rule that an agent cannot use the property of his principal to pay his own debts applies to agents of every grade. The director of a corporation is no more exempt from this rule than the humblest agent in its service;' furthermore it is immaterial, according to some authorities, that a majority of the directors knew of such use and consented thereto, since a contract which directors have no power to make cannot be ratified by them."

and at pages 739-740:

> "A corporation has a cause of action against a person who knowingly accepts corporate funds in payment of the individual debt of an officer of the corporation . . . since in such case the person receiving the money and the officers are joint tortfeasors . . ."

In Arizona, as almost everywhere in the country, one who deals with an agent does so at his risk, if authority is questionable there is a duty to inquire, and the burden of proof of authority of an agent to bind his principal is upon the one who claims such. (*Bank of America National Trust and Savings Association v. Barnett, et al,* 87 Ariz. 96, 348 P.2d 296 (1960).)

The opinion of the Ninth Circuit is induced by an erroneous view of the law and without regard to the clearly established rules of the State of Arizona and this Court. (Actually, it is not even consistent with the law it cited in the opinion.)

CONCLUSION

The effect of the ruling of the Circuit Court is to deprive creditors of the bankrupt corporation of $76,000.00 plus interest, actually due to them on a contract-policy which the corporation had paid for. There is justification, factually or legally, for the Circuit Court's reversal. Obviously, their reversal was prompted by the thought that Mr. Hilkert would somehow benefit from the judgment; and that as the remaining officer of the corporation he should not be allowed to do so. The record does not support such a supposition. Whether or not Hilkert has filed a claim in the pending bankruptcy is immaterial; whether the claim would ultimately be approved and dividends allowed thereon is speculation. The function of the Court of Appeals was not to "try Hilkert," but rather only to determine if there was any substantial evidence to support the Trial Court's factual findings, and to review the Trial Court's application of the law. It may not "create" facts, nor refuse to apply applicable State Law because it is in disagreement with it. For such a flagrant abuse of its function, its decision warrants and requires review by this Court. A Writ of Certiorari should under these circumstances issue.

Dated, Phoenix, Arizona,
January 30, 1967.

Respectfully submitted,
WILLIAM P. MAHONEY, JR.,
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Attorneys for Petitioner.

(Appendix Follows)

Appendix

The pertinent sections of the Arizona Revised Statutes are:

Section 10-193. Receipt of corporate property without making record thereof; false book entries; penalty

A. It is unlawful for a director, officer or agent of a corporation or association to:

1. Knowingly receive or possess himself of any property of the corporation or association otherwise than in payment of a just demand, and, with intent to defraud, omit to make, cause or direct to be made, a full and true entry thereof in its books or accounts.

2. Defraud, destroy, alter, mutilate or falsify any books, papers, writings or securities belonging to such corporation or association, or make or concur in making, any false entries or omit or concur in omitting to make any material entry, in a book of accounts or other record or document kept by the corporation or association, with intent to defraud.

B. A person who violates this section shall be punished by imprisonment in the state prison for not less than three nor more than ten years, or by imprisonment in the county jail for not to exceed six months, and a fine not exceeding

five hundred dollars, or by both such fine and imprisonment.

Section 13-681. Definition

Theft by embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted whether or not such appropriation constitutes a distinct act of taking.

Section 13-682. Acts constituting offense

A person is guilty of theft by embezzlement who:

1. Is entrusted with, or has in his control, property for the use of any other person, and fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust the property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose.

United States District Court for the
District Of Arizona

Civ. No. 4359 Phx.

Robert G. Mooreman, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc.,
Plaintiff,

vs.

Mutual of New York Life Insurance Company, a corporation,
Defendant.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this action plaintiff Robert G. Mooreman, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc., seeks to recover from defendant Mutual of New York Life Insurance Company the sum of $80,000 plus interest due thereon from the 22d day of April, 1961, upon a policy of insurance, defendant's Exhibit "A", executed by defendant, No. 823-53-41S, upon the life of Charles W. Laing. A copy of said policy of insurance, marked Exhibit "A", is annexed to and made a part by reference of the original complaint herein.

The Laing-Garrett Construction Specialties, Inc., hereinafter referred to as the Laing Corporation, was,